

INDEX

		Pages
I.	INTRODUCTION	1
II.	STATEMENT OF FACTS	2
III.	ISSUE INVOLVED	9
IV.	THE WRIT SHOULD NOT BE GRANTED	10
	A. Congress, and the Unbroken Jurisprudence of This and Other Courts, Recognize the Propriety of State Regulation of Marine Insurance	10
	B. R.S. 22:655 Does not Violate the "Doctrine of Uniformity"	12
	1) No Essential Feature of Exclusive Federal Jurisdiction is Involved	13
	2) R.S. 22:655 is Remedial	14
	C. This Remedy Does Not Conflict With Exclusive Jones Act Remedy	16
	D. Limitation of Shipowners' Liability Not Even Involved in this Case	18
	E. Constitutional Issue on Conflict of R.S. 22:655 with Limitation of Liability Act Not Properly Before the Court	20
V.	CONCLUSION	21
	CERTIFICATE	22

TABLE OF AUTHORITIES

Cases

Cascade, The, 241 Fed 206 11

City of Norwich, 118 U.S. 468 19

Davies vs Consolidated Underwriters, 6 So (2d) 351, 199 La 459 ..... 4, 8, 17

Department of Highways vs Lykes Bros. SS Co., 209 La. 381, 24 So. (2d) 623 11

Gager vs Teche Transfer Co., 143 So. 62 14

Great Lakes Dredge & Dock Co. vs Kierajewski, 261 U.S. 479 15

Greaud vs Consolidated Underwriters, C.A. No. 389, Baton Rouge Div 11

Hooper vs California, 155 U.S. 648 10
Hudson vs Georgia Casualty Co., 57 Fed 2d 757..... 14
Just vs Chambers, 312 U.S. 383 13
New Amsterdam Casualty Company vs Soileau (C.A.5) 167 Fed. (2) 767 8
New Orleans Canal & Navigation Co. vs City of New Orleans, 12 La Ann. 364 20
Red Cross Line vs Atlantic Fruit Co., 264 U.S. 109, 44 S.Ct. 274 ..... 8, 14
Reppel vs Board of Liquidation, 11 F.Supp 799..... 20
Southern Pacific Co. vs Jansen, 244 U.S. 205, 37 S. Ct. 524 .....12, 13, 16
Standard Dredging Co. vs Murphy, 319 U.S. 306.....11, 13
West vs Monroe Bakery, 217 La 189, 46 So. 2d 122..... 4, 8
Western Fuel Co. vs Garcia, 257 U.S. 233 15
White vs Lykes Bros. SS Co., Adm No. 1648, Eastern Dist. of La, N.O. Division 11

STATUTES

Louisiana Insurance Code (La.R.S. Title 22)

Section 3 .....4, 6, 9
Section 621 4
Section 623 .....4, 6, 9
Section 653 ..... 6, 9
Section 655 .....1, 2, 4, 5, 6, 9, 11, 12, 13, 14 15, 16, 21
Section 983E 4, 9

FEDERAL STATUTES

Jones Act, 46 U.S.C. 688 .....16, 17
Limitation of Liability Statute 46 U.S.C., Section 183-189 .....8, 18, 19, 21
McCarran Act (15 U.S.C. 1011, 1012) 2, 4, 5, 8, 9, 10, 11, 12, 16, 18
Merchant Marine Act of 1920, 46 U.S.C. 885 (2) 2..... 11
Saving to Suitors Clause 28 U.S.C. 1333 14
Benedict on Admiralty, Vol. 1, p 79 13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 498

MARYLAND CASUALTY COMPANY, et als,
Petitioners—Appellees Below,

versus

GERTRUDE PICARD CUSHING, et al
Respondents—Appellants Below

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. INTRODUCTION

This memorandum is submitted in opposition to the petition of Maryland Casualty Company and the Home Insurance Company of New York for the issuance of a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the 5th Circuit holding valid and constitutionally applicable to maritime torts and insurance policies La. R.S. 22:655 and the Federal

McCarran Act. R. S. 22:655 is a Louisiana statute exercising the police power of the State of Louisiana, as sanctioned by the McCarran Act, to regulate the business of insurance in Louisiana, specifically by requiring liability insurance policies written and delivered in Louisiana to afford a right of a direct action by an injured party against the liability insurer. Petitioners claim that both the Federal McCarran Act, and La. R.S. 22:655 are unconstitutional in their application here, on the supposed authority of an extension of the "Doctrine of Uniformity in Admiralty".

II. STATEMENT OF FACTS

The inaccuracies in, and the inadequacy of, the statement of the case in the petition for writs herein requires its restatement:

On May 19, 1950, the Towboat JANE SMITH capsized in the Atchafalaya River at Melville, Louisiana, on colliding with a railroad bridge, drowning five of its seamen. Shortly after the catastrophy both the owner (Charles C. Smith), and the bareboat charterer who was also the operator (Oil Transport Company), of the JANE SMITH, instituted limitation of liability proceedings on the admiralty side of the United States District Court for the Eastern District of Louisiana in which respondents were impleaded as the personal representatives of the deceased seamen having claims for their deaths. The owner and the charterer in that proceeding both sought complete exoneration from any responsibility to the families of the deceased seamen for the five deaths,

or in the alternative to limit their liability to the value of the JANE SMITH, then a worthless derelict.[1] Claims were duly filed by respondents in the limitation proceedings thus provoked by the owner and the charterer for the deaths, and such proceedings are still pending and are not affected in any way by this suit.

At the time of the catastrophy, both the owner, and the charterer were insured against liability for death, injury or disability incident to the ownership, operation and maintenance of the JANE SMITH by two liability insurance policies as follows:

1) A Standard Workmens' Compensation and Employers' Liability Insurance Policy issued by Maryland Casualty Company, in the amount of $10,000.00, containing a "Maritime Endorsement", in which charterer alone is the name assured.

2) A "Protection and Indemnity" policy issued by The Home Insurance Company of New York, in the amount of $170,000.00, in which both the owner and the charterer are named assureds.

Each of the above policies of liability insurance was actually physically written, issued, and delivered, in the City of New Orleans, State of Louisiana, and by their express terms each policy became effective only on issuance in Louisiana, as appears from the face of each of the policies in question.[2]

---

[1] The JANE SMITH was subsequently salvaged, and valued at $25,000.00, for which amount a stipulation was filed in the limitations proceedings.

[2] See Original Policies, transmitted to the Court along with printed Record.

According to the local law of Louisiana, an injured party, or upon his death his heir, is afforded a right of direct action against the liability insurer of the tortfeasor.[3] This right of a direct action against liability insurors is a part of the public policy of the State of Louisiana, of which the Louisiana Supreme Court has said[4]:

> "The statute expresses the public policy of this state that an insurance policy against liability is not issued primarilly for the protection of the insured but for the protection of the public."

Such public policy is expressed by a series of legislative provisions of the Louisiana Insurance Code exercising the police power of the State of Louisiana to regulate the business of insurance, and the issuance of policies of liability insurance, in Louisiana;[5] and such state regulations have the express sanction of the United States Congress by virtue of the McCarran Act[6] providing:

> "Congress declares that the continued regulation . . . by the several states of the business of insurance is in the public interest.
>
> "The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation . . . of such business."

Availing themselves of the right of a direct action

---

[3] La. R.S. 22:655.
[4] *Davies v. Consolidated Underwriters*, 199 La. 459, 6 So. 2d. 351. See also *West v. Monroe Bakery*, 217 La. 189, 46 So. 2d. 122.
[5] See Louisiana Insurance Code, La. R.S. 22:655; 983E; 621; 623, 3.
[6] 15 U.S.C. 1011, 1012(a).

gainst Maryland Casualty Company and Home Insurance ompany of New York thus afforded by Louisiana R.S. 2:655, as sanctioned by the McCarran Act, respondents rought the five consolidated civil actions here in question n the law side of the District Court against said insurors n their policies of insurance, (and also against the bridge-wner), alleging diversity of citizenship as a basis for urisdiction, and that the deaths were caused by the indi-idual, joint and several negligence of the bridge-tender, nd of the two named assureds under the aforesaid liability olicies, i.e., of the owner of the JANE SMITH, and of her harterer. Only the charterer was the employer of the lrowned seamen; the owner of the vessel had no employ-ment relations with them.

The insurors moved for a summary judgment in the District Court, pleading "no action" clauses of their policies as a defense, on the same grounds urged here for issuance of a writ of certiorari. It must be pointed out, however, that the Maryland Casualty Company policy, while it does contain a "no action" provision, immediately follows same by "Condition H" of its policy specifically revoking its "no action" clause in favor of the "direct action" procedure provided by Louisiana R.S. 22:655 as follows:—

> "*Condition H.* If the method . . . for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, in force in the state in which any of the business operations herein described are conducted, such specific statutory provisions shall supersede such conditions in this contract inconsistent therewith."

Similarly, the Home Insurance Company policy provides:

> "No suit or action on this policy for the recovery of any claim, shall be sustainable . . . unless commenced within twelve (12) months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the state wherein this policy is issued, then in that event, no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State."

It is thus submitted that both the Maryland and the Home policies expressly recognized that the laws of the state wherein they are issued are paramount over, and substitute for, the policy provision; and both policies specifically stipulate for the application of the remedial and procedural laws of the state wherein they are issued where in conflict with policy provisions.

Moreover, both Maryland Casualty Company and Home Insurance Company, in issuing and delivering their policies in Louisiana, did so in contemplation of, and pursuant to, the following provisions of the Louisiana Insurance Code:—

> "Sec. 3. No person shall transact a business of insurance in this state without complying with the provisions of this Code.
>
> Sec. 623. Insurance contracts shall contain such standard provisions as are required by the applicable chapters of this Code . . .
>
> Sec. 653. Any insurance policy . . . hereafter issued,

> and otherwise valid, which contains any conditions or provisions not in compliance with the requirements of this Code shall not be rendered invalid thereby, but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy . . . been in full compliance with this Code.
>
> Sec. 655. No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that . . . an action may . . . be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer within the terms and limits of the policy . . ."

Hence in voluntarilly issuing and delivering their policies within the State of Louisiana, both petitioners herein, Home Insurance Company and Maryland Casualty Company undertook and agreed that their policies should be amended to adopt the "direct action" provisions of the Louisiana Insurance Code as a part of their Louisiana contracts, in conformity with the requirements of Louisiana Law.

In any event, the United States Circuit Court of Appeals for the 5th Circuit reversed the decision of the District Court dismissing the complaints, and in a carefully reasoned opinion appearing at pp.29-34 of the Record, upheld respondents right to avail themselves of the Louisiana Direct Action statute against petitioners' objections, saying:

> "Appellees' contentions over-inflate a relatively simple proposition with apparent, but unreal, technical problems. Stripped of illusory technicalities, the

Louisiana statute merely creates in favor of one who has been wrongfully injured, an additional and cumulative remedy at law against an insurer who has agreed to indemnify the tort feasor against liability, by subrogating the injured person to all the rights of the insured within the terms and limits of the policy. Other existing remedies are not in the least impaired or affected. New Amsterdam Casualty Co. v. Soileau (CA-5) 167 Fed. (2) 767. Such contracts of insurance are for the benefit of the public, as well as of the insured employer. Davies v. Consolidated Underwriters, 6So. (2) 351; West v. Monroe Bakery, Inc., 46 So. (2) 122. The statute is simply a regulation by the state of insurance companies doing business within its boundaries, for which there is ample sanction in federal law. 15 U.S.C.A., 1011, 1012, the McCarran Act. The limitation of liability statutes, 46 U.S.C.A. 183, et seq., relate, not "to the business of insurance" as mentioned in the McCarran Act, but to the liability of shipowners. The object of that proceeding is to limit the liability of the owner, not to preclude injured persons from pursuing any remedy open to them against others. To permit such an action will not defeat the purpose of the federal limitation of liability statute, nor will it interfere with the harmony or uniformity of admiralty law in its international or interstate relations. That the remedy may not exist in states other than Louisiana is not a tenable objection. The same was true in *Red Cross Line v Atlantic Fruit Company, supra,* involving the New York Arbitration statute.

The Louisiana statute is wholly a regulation of the liability of insurers doing business in Louisiana upon obligations voluntarily assumed by them there. We see no reason why it should not be applied to liability policies such as those here sued upon, even though the injuries were suffered upon navigable waters. Federal

jurisdiction exists and the complaints state a cause of action.

III. ISSUE INVOLVED

It is thus apparent that no real issues are involved ere, for certainly so far as Maryland Casualty Company concerned, that Company has expressly stipulated in its licy provisions (Condition H) for the Louisiana Direct tion procedure of R.S. 22:655 to apply against it; and ome Insurance Company has at least inferentially done e same by its policy provision above quoted; while both ave accepted the Louisiana Direct Action provision as a rt of their policies by virtue of issuing and delivering em in Louisiana, subject to the provisions of the Louisia Insurance Code.[7]

At best, the issue is whether La. R.S. 22:655, expressg the public policy of the State of Louisiana to protect s people by the exercise of its police power in regulating e business of insurance within its borders so as to afford right of direct action by injured persons or their heirs gainst liability insurors is, along with the McCarran Act uthorizing and sanctioning it, unconstitutional as applied maritime torts. Simply to state the issue is to answer it. deed, petitioners here are suggesting that this court go the teeth, not only of the public policy of Louisiana, and Congress as expressed in the McCarran Act, but likewise voke its own unbroken jurisprudence upholding state gulation of insurance, including maritime; and to hold

---

a. R. S. 22:3, 623, 653, 655, 983 E.

Louisiana' regulation of liability insurance, and the McCarran Act, unconstitutional as applied to maritime torts on the tenuous excuse of the repudiated Doctrine of Uniformity in admiralty matters. That is the only issue involved.

IV. THE WRIT SHOULD NOT BE GRANTED

A. Congress, and the Unbroken Jurisprudence of This and Other Courts, Recognize the Propriety of State Regulation of Marine Insurance.

Ever since the early decision of this Court in *Hooper v. California*,[8] decided in 1894, state authority to regulate marine insurance has been fully recognized. There the Supreme Court said:—

> "The contention here is that inasmuch as the contract was one for marine insurance, it was a matter of interstate commerce, and as such beyond the reach of state authority . . : This proposition involves an erroneous conception of what constitutes interstate commerce.
>
> "Whilst it is true that in Paul v. Virginia, and in most of the cases in which it has been followed, the particular contract under consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of any kind, constituted interstate commerce. The court in reaching its conclusion upon this question was not concerned with any matter of distinction between marine and fire insurance, but proceeded upon the

---

[8] 155 U.S. 648.

broad analysis of the nature of interestate commerce . . ."

More recently, where state job insurance affected maritime employment, this Court, in *Standard Dredging Corp. v. Murphy*[9] held "In dealing with unemployment insurance, 'exclusive federal jurisdiction' is not affected at all." The United States Court of Appeals for the 2d Circuit held the Direct Action provision of the New York Workmen's Compensation Insurance Law applicable to maritime torts in *The Cascade*,[10] and prior to this case, a number of decisions in the United States District Courts in Louisiana had applied La. R.S. 22:655 to maritime torts, including Jones Act suits,[11] as have the Louisiana Courts.[12]

Congress has always recognized that marine insurance was regulated by state law. Its very definition of "Marine insurance companies" in the Merchant Marine Act of 1920[13] is:

"companies . . . authorized to write marine insurance . . . under the laws . . . of a state".

Finally recently in adopting the McCarran Act,[14] Congress specifically authorized and approved state regulation of "the business of insurance . . . and every person engaged

---

[9] 319 U. S. 306.
[10] 241 Fed. 206.
[11] *White v. Lykes Bros. SS. Co., Inc.* No. 1648 In Admiralty, Eastern District La.; *Greaud v. Consolidated Underwriters*, C. A. No. 389, Baton Rouge, Div.
[12] *Department of Highways v. Lykes Bros. SS. Co., Inc.*, 209 La. 381, 24 So. 2d 623.
[13] 46 U. S. C. 885 (2) 2.
[14] 15 U. S. C. 1011, 1012.

therein" in the broadest possible terms, certainly including maritime insurance, as follows:

> 1011 "Congress declares that the continued regulation . . . by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation . . . of such business by the several states."
>
> 1012 (a) "The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation . . . of such business."
>
> b) "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such act specifically relates to the business of insurance."

Nothing can be clearer than the above to fully establish both that the Supreme Court of the United States and the Congress, as well as all other Courts, have specifically approved state regulation of marine insurance and marine underwriters.

B. R.S. 22:655 Does not Violate the "Doctrine of Uniformity".

Petitioner's principal reliance is placed on the outmoded case of *Southern Pacific Co. vs Jansen*[15] and the now severely restricted doctrine of uniformity in admiralty matters.

---

[15] 244 U. S. 205, 37 S. Ct. 524.

As said by Benedict:[16]

> "State legislation has been regarded in a wide variety of instances as effective to create rights, to establish principles of liability and even to create liens".

From time immemorial, local legislation has affected admiralty jurisdiction and maritime rights. Wherever it does, so-called "uniformity" is disrupted to the extent that local laws are enforced.

The doctrine of "Uniformity" got its principal impetus from the now repudiated decision of the Supreme Court in *Southern Pacific Co. vs Jensen.* But of that case, the Supreme Court recently said:[17]

> "Indeed the *Jensen* case has recently been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws."

As pointed out in the Murphy[18] case, quoting from *Just vs Chambers:*[19]

> "Uniformity is required *only when the essential features of an exclusive federal jurisdiction are involved.*" (Emphasis added)

1) No Essential Feature of Exclusive Federal Jurisdiction is Involved.

No essential feature of an exclusive federal jurisdiction which will be involved by applying R.S. 22:655 in this case

---

[16] Admiralty, Vol. 1, p. 79.
[17] *Standard Dredging Co. v. Murphy*, 319 U. S. 306 at p. 309 (1943).
[18] Op. Cit. *supra*, Note 31.
[19] 312 U. S. 383.

has been pointed to here. It has been said only generally that "uniformity" will be interfered with. It is respectfully submitted that the burden is on those asserting it to show how, in view of the well established presumption of constitutionality of legislation, R. S. 22:655 involves such an essential feature. It is further submitted that such unconstitutionality cannot be shown in view of the authorities herein referred to.

2) R. S. 22:655 is Remedial

In the first place, R. S. 22:655 is a remedial statute, and has been held to be remedial both by the Louisiana[20] and the Federal[21] Courts. 28 U.S. C. 1333, reenacting the "Saving to Suitors" clause of the Judiciary Act of 1789, specifically provides, with respect to admiralty and maritime matters:

> ". . . saving to suitors in all cases all *other remedies to which they are otherwise entitled*" (Emphasis Added)

The United States Supreme Court in specifically holding the New York Compulsory Arbitration Law—a state remedial statute unknown to Maritime Law—applicable and enforceable in Admiralty and not destructive of "uniformity", said:[22]

> "By reason of the saving clause, state courts have jurisdiction in personnam, concurrent with the Admiralty Courts, of all causes of action maritime in their nature arising under charter parties . . . The

---

[20] *Gager v. Teche Transfer Co.*, 143 So. 62.
[21] *Hudson v. Georgia Casualty Co.*, 57 Fed. 2d 757.
[22] *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 44 S. Ct. 274.

"right of a common law remedy" so saved to suitors does not, . . . include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law . . . the state having concurrent jurisdiction, is free to adopt such remedies and to attach to them such incidents, as it sees fit.

This state stature is wholly unlike those which have recently been held invalid by this Court. The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt either to modify the substantive maritime law or to deal with the remedy in courts of admiralty.

Those (statutes) giving the substantive right to recover for negligence resulting in death were upheld because they merely supplemented the substantive maritime law and did not conflict with any essential feature of it. *Western Fuel Co. vs Garcia*, 257 U.S. 233, *Great Lakes Dredge & Dock Co. vs Kierajewski*, 261 U. S. 479, etc."

Hence R. S. 22:655, as a State remedial stature, is a remedy specifically "saved to suitors" in Admiralty and Maritime cases. As this proceeding is on the law side of the court under diversity of citizenship jurisdiction, the court must, then, apply the remedy of the state law "saved to suitors" by the Judiciary Act.

The claim asserted on page 13 of the Petition in this case that the McCarran Act is also unconstitutional in its application to marine insurance because Congress thereby exceeded its power and "trangresses the Constitutional limitations . . . on the power of Congress to delegate its authority to legislate in maritime matters . . . for it had no constitutional authority to abdicate to the states its exclusive power to legislate in maritime matters" represents such an extreme extension of the repudiated *Jansen* Doctrine of Uniformity as to require no further comment on what has already been said. Yet obviously this Court must be prepared to declare the McCarran Act at least partially unconstitutional to reach the result sought by petitioner.

C. This Remedy Does Not Conflict With Exclusive Jones Act Remedy.

In the first place, this action is against the insuror both of the owner, as well as the insuror of the charterer of the JANE SMITH. The Jones Act only provides a remedy for a seaman against his employer, in this case the charterer. The action against the insuror of the owner is not governed by the Jones Act at all, and hence is not affected in any way by the Jones Act.

Secondly, as pointed out by the Court below, these suits are a "remedy at law against an insurer who has agreed to indemnify the *tortfeasor* against liability, by subrogating the injured person to all rights of the insured within the terms and limits of the policy."[23] Jones Act liability is

---

[23] See R. p. 33.

included among the types of indemnification to which the insuror has agreed, and to which the injured person is subrogated. Hence the Jones Act is, and remains, the *measure* of the insurors liability, and the situation is absolutely no different than if the tortfeasor had gone bankrupt after his liability arose. Moreover, even in a limitation proceeding, the Jones Act liability is determined; the limitation merely acts as a bar to recovery against the owner or charterer personally, which it is the policy of the Louisiana legislature not to permit to interfere with recovery against his liability insuror because of the public policy in Louisiana, "that an insurance policy against liability is not issued primarilly for the protection of the insured but for the protection of the public."[24]

Finally, the direct action suit against the insurors is in no sense of the word an alteration or an extension of the Jones Act claims against the employer of the deceased seamen, but is a suit on the policy of insurance itself by the seamen as subrogees of the insured employer wherein, as above stated, the insured's Jones Act liability remains the measure of the insuror's liability, and the two claims, i.e., the seaman's Jones Act claim against the insured, and the insured's contract claim under the policy for indemnity against the insuror to which the seaman is subrogated, are telescoped together in one direct action. Certainly this is neither an alteration nor an extension of the Jones Act,

---

[24] *Davies v. Consolidated Underwriters*, 6 So. 2d 351.

but merely a proceedural short-cut device for getting immediately at the party who has assumed ultimate liability for the loss.

D. Limitation of Shipowners' Liability Not Even Involved in this Case.

Petitioners have dragged into this case the red herring of a supposed circumvention or nullification of the Limited Liability Acts.[25] Neither the shipowners, nor their liability, is involved here; they are not even parties to these suits. No funds of theirs—or liability—is involved, except as a measure of the insurors' liability.

In the first place, the Court is prohibited from entertaining any suggestion of a conflict between the Limited Liability Acts and La. R.S. 22:655, or if there is any such conflict, then it must be resolved in favor of La. R.S. 22:655, because the McCarran Act specifically provides:[26]

> "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such act specifically relates to the business of insurance."

The Limited Liability Acts obviously do not "specifically relate to the business of insurance," and hence cannot even be considered as invalidating, impairing or superseding La. R.S. 22:655.

---

[25] 46 U. S. C. 183-189.
[26] 15 U. S. C. 1012 (b).

Secondly, these actions cannot possibly require a shipowner entitled to limitation to "surrender his insurance proceeds into his limitation fund" or any other fund. He is not entitled to any "insurance proceeds" under a liability policy! This is the great difference between this case and *City of Norwich*,[27] where hull insurance was involved.

Thirdly, it is well known that the Limited Liability Act was passed for the express purpose of protecting and safeguarding the shipping industry, and encouraging the development of an American merchant marine by relieving shipowners from the enormous risks of marine disasters so as not to expose their entire patrimony in one catastrophy. Congress carefully limited such protection to owners, and their direct counterparts—bareboat charterers who stood *in hac vice*. Congress certainly did not intend to afford such protection to marine insurers, whose very business it is to assume such risks for a substantial premium! And yet these very marine insurers would have this Court extend to them the protection Congress so carefully limited, and denied to them.

Indeed it is certainly questionable, and almost a species of fraud, for an insuror who accepted a substantial premium on the representation that it was affording $170,000.00 of insurance, to hide behind an owner's statutory immunity and seek to reduce such insurance to only $25,000.00. The premium exacted here by Home Insurance Company was $2,550.00—over 10% on the claimed ex-

---

[27] 118 U. S. 468.

posure—for only one years coverage!! Is not Louisiana's public policy, as expressed in its direct action statute, fair, proper and equitable in requiring an insuror to do no less than it undertook in affording to the injured party the protection and indemnity for which the insured paid, and to prohibit it from hiding behind the statutory immunity of the insured?

E) Constitutional Issue on Conflict of R. S. 22:655 with Limitation of Liability Act Not Properly Before the Court

Finally it is a well established principle of constitutional law that a court will never pass on the constitutionality of a statute or its application, except in a suit in which such issues are directly raised by parties whose interests will be adversely affected by such decision, and the issue cannot be avoided.[28] Here this Court is being asked to decide this case, not on the basis of any constitutional rights of the underwriters, but on the basis of a supposed deprivation of a right of the assured—who is not a party to this litigation—"to be reimbursed by his underwriters". It is thus apparent that the underwriters have no interest in the constitutional question here asserted because in any event they are liable only up to the extent of the limits of their policies, and it is indifferent to them to whom it is paid.

Thus the only person entitled to raise the question of

---

[28] See *Reppel v. Board of Liquidation*, 11 F. Supp. 799; *New Orleans Canal and Navigation Company v. City of New Orleans*, 12 La. Ann. 364.

whether a direct action under R. S. 22:655 impairs the insured's right to reimbursement on his policy, or his immunity under the Limited Liability Acts, is the insured himself. This the insured could have done by intervening in this suit, which he failed and neglected to do. Hence, it is apparent that such issue of constitutional law is not properly before the court.

V. CONCLUSION

It is respectfully submitted in view of the reasons and authorities hereinafter referred to that no special nor valid reasons are presented for the granting of a writ of certiorari by this Court, and that the constitutional issues raised, besides being patently invalid, are not properly raised by parties really at interest, whose interests will be adversely affected by a decision on the constitutional issues. The application for the writ should therefore be denied.

Respectfully,

JAMES J. MORRISON
Proctor for Respondents
1014 Pere Marquette Building
New Orleans, Louisiana

Of Counsel:

W. W. Ramsey, Esq.
Arthur Delahoussaye, Esq.
Raymond H. Kierr, Esq.
Brown & Rault, Esqs.

CERTIFICATE

I hereby certify that a copy of this memorandum was mailed to Eberhard P. Deutsch, Deutsch, Kerrigan & Stiles, Hibernia Bank Building, New Orleans, Louisiana, on this the 10th day of February, 1953.

James J. Morrison
Proctor for Respondents